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In the Supreme Court of the United States

OCTOBER TERM, 1961

ALFRED J. HEINECKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 1a-5a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1961. The petition for a writ of certiorari was filed on August 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court erred in expressing an opinion, fully qualified that it was only advisory, that the material in question was obscene.

2. Whether the court was correct in excluding books and magazines available to the public, proffered by petitioner to show community standards, and in refusing to admit testimony of a psychiatrist and a psychologist on the issue of community standards.

3. Whether it was proper to charge petitioner with two separate offenses, mailing obscene matter and mailing information as to where and from whom obscene matter could be obtained, arising out of a single act of mailing.

4. Petitioner also raises, although the court of appeals found it unnecessary to consider, the question of whether evidence obtained under a search warrant (relating only to counts not necessary to support the judgment) should have been suppressed.

STATUTES INVOLVED

18 U.S.C. 1461 provides in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *.

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * *

22 D. C. Code 2001 provides as follows:

Whoever sells, or offers to sell, or give away, in the District, or has in his possession with intent to sell or give away or to exhibit to another, any obscene, lewd, or indecent book, pamphlet, drawing, engraving, picture, photograph, instrument, or article of indecent or immoral use, or advertises the same for sale, or writes or prints any letter, circular, handbill, book, pamphlet, or notice of any kind stating by what means any of such articles may be obtained, or advertises any drug, nostrum, or instrument intended to produce abortion, or gives or participates in, or by bill, poster, or otherwise advertises, any public exhibition, show, performance, or play containing obscene, indecent, or lascivious

language, postures, or suggestions, or otherwise offending public decency, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned not more than one year, or both.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on twenty-eight counts of advertising and mailing obscene matter.[1] He was sentenced to imprisonment for one year on count 35 of the indictment and for a period of fifteen to forty-five months on each of the remaining counts, all sentences to be concurrent (J.A. 253). The court of appeals affirmed.

There is no dispute as to the fact that petitioner sent through the mails advertisements for a four-volume booklet entitled "Basic Approach to Drawing

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[1] The indictment, consisting of thirty-five counts, was returned against petitioner and Herman L. Womack. Count 1 charged conspiracy to violate 18 U.S.C. 1461, mailing of obscene matter, and 22 D.C. Code 2001, possession, etc., of such matter. The even-numbered counts of the indictment, 2 to 32, charged mailing of information as to how obscene matter could be obtained, a different recipient being named in each count. Each of the odd-numbered counts, 3 to 33, charged mailing obscene matter to the recipients named in each preceding count. Count 34 related solely to defendant Womack. Count 35 charged that during the approximate period of August 15 to November 10, 1960, within the District of Columbia, petitioner and Womack knowingly printed certain letters and pamphlets stating how obscene books and pictures could be obtained (J.A. 1-11). At the beginning of the trial, the government dismissed counts 18-19 and 30-33, inclusive (Pet. 2a).

the Nude," together with samples of photographs from the booklet. On behalf of petitioner, Dr. Albert Ellis, a psychologist, testified from his examination of the various exhibits that, taken as a whole, they would not appeal to the prurient interest of the average person (J.A. 85-86). In his opinion, they might appeal to some homosexuals, but not to the average man (J.A. 86-87). Nor did he think that they would excite unwholesome sexual thoughts in boys sixteen to nineteen years of age, expressing the view that any boy who would send for the booklet would not be an average American boy (J.A. 87-88). The court refused to permit this witness to testify as to what community standards were, holding that his qualification as an expert in that field had not been established (J.A. 70-71). The court also excluded books offered by petitioner that were claimed to be comparable in content to the material here in question, holding that the mere fact that such books were in general circulation would not establish that they met community standards (J.A. 89-90).

Dr. Ilsley Boone, an eighty-two year old former Baptist minister, also testified on behalf of petitioner (J.A. 101). He stated that he published certain nudist magazines and that for twenty-five years he had been the active leader of the nudist movement (J.A. 103-104). The court sustained a government objection to his qualification as an expert on contemporary standards of morality and literature (J.A. 104). Thereafter, petitioner's counsel asked leave to withdraw the witness, who felt that both he and the nudist movement had been insulted, although

counsel did not know what the court had said to cause this feeling (J.A. 107).[2] Subsequently counsel withdrew the motion to withdraw the witness but refrained from asking him any further questions (J.A. 115).

Dr. Frank J. Fagan, Jr., a psychiatrist, testified after examining a number of photographs and booklets offered by petitioner to subscribers that they would not appeal to the prurient interest of the average person (J.A. 134). He expressed doubt as to certain exhibits, but later gave his opinion that none of the exhibits would appeal to the prurient interest of the average person (J.A. 141-144). There was also testimony by the artist who had prepared the text of the four-volume booklet as to its value for purposes of instruction (J.A. 120-126) and by another artist as to the value of such photographs in making art restorations (J.A. 126-128).

ARGUMENT

1. In its charge, the court said (J.A. 234):

> As I have indicated to you, the issues of fact and the question of obscenity as an issue of fact

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[2] The court said with respect to Dr. Boone's qualification (J.A. 104): "I am going to sustain the objection. You see, I don't question the Doctor's ability. But he is a leader of a cult, which is very much of a minority cult and which most people disapprove, and which most people consider either immoral or as consisting of people who have a mental quirk. Whether the majority or the minority is right, that is immaterial for this purpose. But certainly a person in that position isn't competent to give an expert opinion on what constitutes the community standards, because those are the majority standards."

are for you to determine and solely for you. As I indicated to you before, the law authorizes the Judge to express an opinion on any specific issue of fact. If he does so, this opinion is not binding on the jury. While it is my opinion that this material, that is, the material charged in the indictment, is actually obscene in the eyes of the law, I repeat that my opinion is not binding on you, you have a right to disregard it or not, as you choose. The issue is for you to decide, and not for me, and you are not bound by my opinion. The final decision must be yours. That is your function and your responsibility.

At various points in his charge the trial judge made clear that it was the function of the jury to determine the facts and that his duty in that regard was wholly advisory: "In addition to instructing the jury as to the law, the Court has a still further function to perform in connection with the jury, and that is to summarize the evidence, to discuss and comment on the facts and on the evidence, and even to express an opinion on any issues of fact. But all this is done solely to aid and assist the jury and only for that purpose. The Court's summary of the evidence, the Court's discussion and comment on the facts and on the evidence and the Court's opinion as to any issue of fact are not binding on you, they are intended only to help you, and you need attach to them only such weight as you deem wise and proper and as you desire. If your recollection or your understanding or your view of the evidence or your opinion on any issue of fact differs from the Court's recollection, the Court's understanding, or the Court's view or the Court's opinion, then it is your recollection, your understanding, your view and your opinion that must prevail because, I repeat, the final decision on the facts is solely within your domain, my instructions are binding on you only as concerns the law. As some of the books say, the Judge instructs the jury as to the law but only advises them as to the facts." (J.A. 227-228). And again: "The

The court of appeals disapproved of the trial court's expression of opinion here, but held that it did not call for a reversal in view of other portions of the charge, which emphatically instructed the jury that the issue of obscenity was for their determination (Pet. App. 3). That decision was clearly correct, and no further review by this Court is warranted. The district court's expression of opinion, almost in passing, was not coercive. It was within permissible limits, *United States* v. *Murdock*, 290 U.S. 389, especially considering the nature of these exhibits. Cf. *Horning* v. *District of Columbia*, 254 U.S. 135.[1]

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query is whether it was obscene, and that is for you to decide. * * * Whether the material in question is obscene within the test that the law lays down is a question of fact to be determined by you." (J.A. 232). And further: "Now let me briefly summarize the evidence bearing on these counts, and I want to repeat that what I say about the evidence is not binding on you, it is intended only to help you. Your view and your understanding of the evidence is paramount and if it differs from the Court's view or understanding, then it is your view and understanding that must prevail." (J.A. 236).

[1] With respect to similar materials involved in the case of *Womack* v. *United States*, D.C. Cir. No. 15749 (1961) (not yet reported), certiorari denied, 365 U.S. 859, the court of appeals had said: "Whatever may be the precise meanings of 'obscene' and 'filthy,' or however broad or liberal community standards may be alleged to be, the photographs presented as Government exhibits in this case are within the definitions and outside the standards. No concept of art as art could include them. No concept of community standards could permit them."

2. The question as to exclusion of magazines and limitation of the testimony of petitioner's expert witnesses is the same as that presented in Hoosier v. *United States*, D.C. Cir. No. 15749 (1961) (not yet reported), certiorari denied, 365 U.S. 859. The issue is fully discussed in our brief in opposition in that case, No. 717, October Term 1960 (at pp. 7-10). The court here permitted the witnesses to testify fully with respect to all points except community standards, as to which their qualifications to give an opinion were not established.

3. The contention that there was duplication in the odd and even counts of the indictment based on the same mailings (one group based on the advertising matter and the other on the obscene materials enclosed) presents no issue requiring resolution since the sentences are concurrent. The conviction on any one count alone sustains the sentence. *See Hirabayashi v. United States*, 320 U.S. 81, 85.

4. Prior to trial, petitioner unsuccessfully moved to suppress as evidence all property seized from his home on December 7, 1960, on the ground that the warrants were issued without probable cause and that the search was "evidentiary" (J.A. 14-15). The warrant for the original search was based upon an affidavit of a postal inspector dated December 6, 1960, which stated that he had reason to believe that on specified premises in Ocean County, New Jersey, there was being concealed an obscene booklet entitled "Basic Approach to Drawing the Nude," volumes 1 to 4, together with obscene photographs and negatives and an advertising pamphlet stating

how said materials could be obtained; that he had made purchases through the mail of advertising matter and obscene photographs from A. Heinecke, who, to his personal knowledge, resided at said address and who was the editor and publisher of said booklet; that the envelope in which such matter was mailed contained the return address of petitioner (J.A. 249-50). The return to the search warrant showed execution on December 7, 1960, and the seizure of a large number of the described booklets, together with photographs, nude drawings, Christmas cards of a nude male and advertising material (J.A. 248). A second affidavit for search warrant, dated December 7, 1960, based on the officer's observation while executing the first warrant, was for mailing lists for the aforesaid booklet (J.A. 250-51). The warrant was issued and the mailing lists seized on December 7.

The court of appeals properly held that the question of probable cause for issuing the search warrants need not be reached, in view of the fact that the sentences on all counts were concurrent. The evidence seized had relevancy only as to counts 1 and 35, conspiracy and possession, etc., of obscene material. As to the other counts, the advertising and obscene material received through the mail that formed the basis of prosecution had been turned over to the prosecution by the recipients so that the evidence seized at petitioner's home was immaterial. In any event, as appears from a mere reading of the affidavits (J.A. 249-51), the search warrant was validly issued on probable cause, and the return (J.A.

248) shows that the seizure was of materials properly subject to seizure as obscene.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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